

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1725

Cir. Ct. No. 2011CV4023

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**LUVENIA WILLIAMS AND INDEPENDENT CARE HEALTH PLAN A/K/A
ICARE MEDICAID PLAN,**

PLAINTIFFS-RESPONDENTS,

v.

MILWAUKEE TRANSPORT SERVICES, INC. AND MILWAUKEE COUNTY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed and cause remanded.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Milwaukee Transport Services, Inc. and Milwaukee County (collectively “Milwaukee Transport,” unless otherwise noted) appeal from a non-final order of the circuit court, denying their motion for summary

judgment.¹ The appeal requires that we determine whether there exists a material issue of fact regarding whether a Milwaukee Transport employee used two straps to secure Luvenia Williams's scooter in a county bus. Having reviewed the record, we conclude that a material question of fact does exist. As such, we affirm the circuit court's order and remand for trial.

BACKGROUND

¶2 It is undisputed that, in March 2009, Williams boarded a Milwaukee County bus operated by Milwaukee Transport while riding a three-wheeled motorized scooter. A video taken from the bus at the time Williams boarded shows Williams driving her scooter to the designated area and the bus driver bending over near the back of the scooter and then bending over near the front of the scooter. The bus driver alleges that she was bending over to secure the scooter using three straps designated for that purpose. The parties agree that Milwaukee Transport policy required the bus driver to use at least two straps to secure the scooter. Several minutes later, the video shows Williams's scooter tip over, seemingly without resistance, as the bus makes a right turn.

¶3 Williams and her insurer filed suit against Milwaukee Transport and Milwaukee County, alleging that the bus driver failed to properly secure her scooter, and that the bus driver's negligence caused her injury.

¶4 Milwaukee Transport moved for summary judgment on two grounds. First, Milwaukee Transport alleged that it was immune from liability

¹ Milwaukee Transport petitioned this court for leave to appeal the non-final order pursuant to WIS. STAT. §§ 808.03(2) and 809.50 (2011-12), and we granted the petition. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

under WIS. STAT. § 893.80(4) for any negligence resulting from the bus driver's discretionary acts and that the bus driver complied with her ministerial duty to use at least two straps to secure Williams's scooter. Second, Milwaukee Transport alleged that, even if it was not entitled to immunity, Williams lacked proof that Milwaukee Transport was causally negligent.

¶5 In an oral ruling from the bench, the circuit court found: (1) that WIS. STAT. § 893.80(4) applied to Milwaukee Transport, making Milwaukee Transport immune for its discretionary acts; (2) that Milwaukee Transport required its drivers to use at least two straps to secure Williams's scooter; and (3) that using two straps was a ministerial act from which Milwaukee Transport did not enjoy immunity. After considering all of the evidence, the circuit court then determined that a material question of fact existed regarding whether the bus driver used at least two straps to secure the scooter. As such, the circuit court denied Milwaukee Transport's motion for summary judgment and set the case for trial, entering a written order to that effect.

¶6 Milwaukee Transport petitioned this court for leave to appeal the circuit court's non-final summary judgment order. We granted the petition.

DISCUSSION

¶7 Milwaukee Transport argues that the circuit court erred when denying Milwaukee Transport summary judgment because: (1) the undisputed facts show that the bus driver used two straps to secure the scooter, and that therefore, the only remaining issue is whether the bus driver was negligent in how she positioned the straps, a discretionary decision for which Milwaukee Transport

enjoys immunity under WIS. STAT. § 893.80(4)²; (2) Williams’s claims require her to have expert testimony; and (3) even if Milwaukee Transport does not enjoy immunity, Williams has presented no evidence that Milwaukee Transport was negligent. We affirm the circuit court and conclude that: (1) a material issue of fact does exist regarding whether the bus driver used at least two straps to secure the scooter, a ministerial duty for which the parties agree that Milwaukee Transport is not immune; (2) the issue presented is not so far outside the realm of human experience so as to require expert testimony; and (3) Williams has set forth sufficient evidence to allege negligence. As such, we affirm.

¶8 Our review of the circuit court’s summary judgment decision is *de novo*, but we use the same method as the circuit court. See *Pinter v. American Family Mut. Ins. Co.*, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In deciding whether there are factual disputes, the circuit court and the reviewing court consider whether more than one reasonable

² WISCONSIN STAT. § 893.80(4) states:

Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.

....

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. *Hennekens v. Hoerl*, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). We draw all reasonable inferences from the evidence in favor of the nonmoving party. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶28, 303 Wis. 2d 295, 735 N.W.2d 448. “Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.” WIS JI-CIVIL 230 (2011). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are also questions of law that we review *de novo*. *Hennekens*, 160 Wis. 2d at 162.

- A. *A material issue of fact exists regarding whether the bus driver used two straps to secure Williams’s scooter.*

¶9 Williams alleges in her complaint that “the bus driver was negligent in failing to exercise the highest degree of care for the safety of [her] passengers” and that the bus driver’s negligence “was a proximate cause of ... [Williams’s] fall and [her] resulting injuries.” The parties agree: (1) that Milwaukee Transport is immune from liability under WIS. STAT. § 893.80(4) for its discretionary acts, *see Rolland v. County of Milwaukee*, 2001 WI App 53, ¶¶11-12, 241 Wis. 2d 215, 625 N.W.2d 590; (2) that Milwaukee Transport is liable, that is, not immune, for its ministerial acts, *see id.*; (3) that Milwaukee Transport required its bus drivers to secure scooters with at least two straps; and (4) that the bus driver’s duty

to secure the scooter with at least two straps was ministerial.³ As such, the primary issue before this court is narrowly defined: Whether a material issue of fact exists regarding whether the bus driver secured Williams's scooter with at least two straps as required by Milwaukee Transport's policy. We conclude that a material issue of fact does exist.

¶10 The following evidence was presented to the circuit court regarding whether the bus driver secured the scooter with at least two straps:

- *The bus driver's deposition testimony.* The bus driver testified that she secured the scooter using three straps.
- *A video recording taken from the bus at the date and time in question.* The video shows Williams boarding the bus on the scooter and the bus driver bending over toward the floor around the rear and then the front of Williams's scooter. Several minutes later, the video shows Williams's scooter tipping over, seemingly without resistance, when the bus driver makes a right turn. No straps are visible in the video.
- *The deposition testimony of William Locher.* Locher testified that he was the Milwaukee Transport manager of administration, that he was responsible for safety training bus operators, including teaching

³ Williams argues in her response brief that because Milwaukee Transport policy explicitly requires its drivers to use at least two straps to secure scooters like Williams's, Milwaukee Transport does not enjoy immunity under WIS. STAT. § 893.80(4) for the manner in which a driver chooses to secure the straps. That question is not before us on appeal and therefore we do not address it.

“wheelchair securement,” and that he authors some of Milwaukee Transport’s safety policies.⁴ Locher testified that if “an operator properly secured the scooter in compliance with the [two-strap policy]” it was unlikely that the scooter would tip over. He “would not have expected that [Williams’s] scooter would have tipped over had it been properly secured.” He also testified that the straps used to secure the scooter were “web strap[s]” “like a seat belt” and that the part of the scooter properly secured to the belt “shouldn’t be able to move that far from the end of the web belt.”

¶11 Looking at the evidence in the light most favorable to Williams, as we must do on summary judgment, *see Grams*, 97 Wis. 2d at 338-39, we conclude that the evidence is sufficient as a matter of law to create a genuine issue of material fact regarding whether the bus driver performed her ministerial duty and used at least two straps to secure Williams’s scooter. While the bus driver testified that she used three straps to secure the scooter and the video shows her

⁴ In her brief, Williams relies on Locher’s testimony regarding his employment responsibilities. She includes several pages of the transcript of that testimony in her appendix, and states in both her brief and in the table of contents to her appendix, that those portions of the transcript on which she relies can be located at record document 24. However, record document 24 is Milwaukee Transport’s summary judgment reply brief and does not appear to contain portions of Locher’s transcript. We caution counsel to use more care when citing to the record. We normally do not consider evidence not in the record. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). But because Milwaukee Transport does not contest these facts regarding Locher’s employment responsibilities or otherwise argue that this information was not before the circuit court, we deem it admitted for purposes of appeal. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted facts are deemed admitted).

bending over several times near the base of the scooter, the straps are not visible on the video either while the bus driver is allegedly securing them or after the scooter tips over. Furthermore, Locher testified that in his experience, he would not expect a scooter properly secured with two straps to tip over. *See* WIS JI-CIVIL 230 (Both circumstantial and direct evidence can be used to prove a fact.). A reasonable finder of fact could conclude based on the video and Locher's testimony that the scooter was not properly secured because the bus driver did not use at least two straps to secure it.

B. Williams does not need expert testimony.

¶12 We also reject Milwaukee Transport's contention that Williams needs expert testimony to prove that the scooter tipped over because fewer than two straps were used rather than because three straps were used ineffectively. Whether expert testimony is required in a given case is a question of law subject to our independent review. *Grace v. Grace*, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

¶13 First, contrary to Milwaukee Transport's contention, Williams's factual accusation that fewer than two straps were used is *not* based *solely* upon the video in which the viewer sees Williams's scooter tipping over, seemingly without any resistance, and without visual confirmation that two or more straps were secured. Williams's accusation is also supported by Locher's testimony. Locher testified that he was Milwaukee Transport's manager of administration, that he was responsible for safety training bus operators—including teaching “wheelchair securement”—and that he authors some of Milwaukee Transport's safety policies. Locher testified that if “an operator properly secured the scooter in

compliance with the [two-strap policy]” it was unlikely that the scooter would tip over.

¶14 Second, “[b]efore expert testimony is required the circuit court must find that the matter involved is ‘... not within the realm of the ordinary experience of mankind.’” *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 379, 541 N.W.2d 753 (1995) (citation omitted; ellipses in *Weiss*). Here, whether the scooter was secured with two or more straps is certainly not outside the realm of ordinary experience. An ordinary factfinder watching the video can understand where the straps would have been secured if the bus driver did in fact secure them, and then determine if those straps would permit the scooter to tip over in the manner it did. This is not a case where the jury is faced with an unusually complex or esoteric issue requiring expert testimony. *See id.*

C. *Williams has set forth evidence from which a reasonable factfinder could find that Milwaukee Transport was negligent.*

¶15 Milwaukee Transport also complains that even without statutory immunity it was entitled to summary judgment because the only evidence of negligence is the fact that the accident occurred. Milwaukee Transport argues:

There is no evidence of what, if anything, the driver could have done differently in strapping this motorized scooter Should the straps have been positioned higher? Lower? Tighter? Looser? Would the lap belt Williams refused have made a difference? Should the scooter have been facing a certain way? Should its wheels have been turned a certain way? What was wrong with the way the driver fastened the straps? There is no evidence of the proper standard or that the driver breached the standard.

The problem with Milwaukee Transport’s argument is that it presumes that the factfinder will conclude that the bus driver did indeed use two straps to secure the scooter. As set forth above, that question has not yet been answered.

¶16 Consequently, we affirm the circuit court and remand this case for further proceedings.

By the Court.—Order affirmed and cause remanded.

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